SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950 51

No. 341 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER, ET AL.,

Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 541

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER, MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN, DAVE TIGER AND EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee

STATEMENT AS TO JURISDICTION

Appellants having presented this day their petition for appeal now file this, their statement, of the basis on which they contend that the Supreme Court of the United States has jurisdiction to review the judgment in question and to exercise such jurisdiction in this case.

The Statutory Provisions Believed to Sustain the Jurisdiction

This appeal is prosecuted from a judgment of the Court of Appeals of the State of New York, which is the highest court of the State of New York in which a decision in the

within matter can be had. There is drawn into question the validity of Chapter 360 of the Laws of 1949, being Section 3022 of the Education Law of the State of New York, on the ground that, on its face and as construed, it is repugnant to the Fourteenth Amendment to the Constitution of the United States. The decision of the Court of Appeals was in favor of the validity of said statute. This Court has jurisdiction on appeal to review the final judgment in question by virtue of the express provision set forth in Title 28 U. S. C., Section 1257.

The Statute Involved

Chapter 360 of the Laws of 1949, being Section 3022 of the Education Law, reads as follows:

"Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without

regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups such as the communist party and its affilated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

"§2. Section three thousand twenty-two, three thousand twenty-three and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby renumbered to be sections three thousand twenty-three, three thousand twenty-four and three thousand twenty-five respectively.

"§ 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

"§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employes in the public schools in any city or school district of the state who violate

the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as

may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

"§ 4. The schedule of section headings of article sixty-one of such law is hereby amended to read as follows:

"3022. Elimination of subversive persons from the public school system.

"3023. Liability of a board of education, trustee or trustees.

"3024. Teachers responsible for record books.

"3025. Verification of school register.

"§ 5. This act shall take effect July first, nineteen hundred forty-nine."

Rules were issued by the Board of Regents for the implementation of said statute as follows:

"Rules of the Board of Regents

(Adopted July 15, 1949)

Chapter XV-B

Subversive Activities

"Section 254 *Disqualification or removal of superintendents, teachers and other employes.*

"1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a of the Civil Service Law.

"a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory

provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

"b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

"c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

"d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

"e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dis-

missal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

"2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

"3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures

taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

"4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

"5. This section shall take effect immediately."

Date of Judgment Sought To Be Reversed and the Date Upon Which the Application For Appeal Is Presented

The judgment of the Court of Appeals which is here sought to be reversed was rendered on November 30, 1950. This application for appeal is presented January 16, 1951.

Statement Showing That the Nature of the Case and the Rulings of the Court Are Such As To Bring the Case Within the Jurisdictional Provision Relied Upon

The issues in this case were presented to the state court by a motion for judgment on the pleadings made by plaintiffs (p. 8).[1] Two other actions were brought in the state courts presenting substantially the same questions, all of which were heard and decided together by the Court of Appeals. Appeals are also being presented to this Court in those actions which are entitled "Thompson v. Wallin" and "Matter of L'Hommedieu v. Board of Regents".

The pleadings consisted of a complaint and an answer. The complaint (pp. 9-29) sought a declaration that Chapter 360 of the Laws of 1949, commonly known as the Feinberg Law, was unconstitutional and that the rules prepared to implement it were likewise unconstitutional (see p. 85).

The action was originally brought by various groups of plaintiffs, the Teachers Union (pp. 9-10), individuals who were only teachers (p. 10) and others who were both teachers and taxpayers (pp. 10-12) as well as some who were parents (pp. 12-14) and others who were connected with various organizations. At Special Term the complaint was dismissed as to all those who were not taxpayers (pp. 4-5). It survives in this Court, therefore, only as to those plaintiffs taxpayers whose names are set forth in the caption.

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[1] The references are to the pages of the record as printed for use in the Court of Appeals of the State of New York.

The complaint attacks the laws and the regulations issued thereunder as violating the Fourteenth Amendment to the United States Constitution in various respects (see pp. 21, 24).

At Special Term Mr. Justice Hearn accepted the contentions advanced by plaintiffs that the laws and regulations denied due process (pp. 55-199). A copy of this opinion is hereto annexed. The opinion rested expressly upon the due process clause of the Fourteenth Amendment (p. 199).

In the Appellate Division this determination was reversed (pp. 78-82). A copy of the opinion of that Court is also hereto annexed. The various constitutional attacks upon the statute were discussed and held unavailing.

Likewise in the Court of Appeals the opinion of the Court (a copy of which is hereto annexed) expressly passed upon and rejected the contention of plaintiffs that the statute denied due process under the Fourteenth Amendment in various respects.

The opinion of the Court of Appeals thus construed the statute to permit the Board of Regents to promulgate lists of allegedly subversive organizations and permit the educational authorities on the basis of such lists to declare employees in the educational system (both teachers and nonteachers) to be prima facie disqualified from continuing to hold their positions merely because of membership in any such organizations.

Statement of the Grounds Upon Which It Is Contended That the Questions Involved Are Substantial and the Authorities Relevant Thereto

1. The statute and the regulations issued thereunder have the effect of disqualifying persons from employment as teachers or from other employment in connection with the educational facilities of the state and its subdivisions

merely because of membership in an organization alleged to be subversive. In so doing they interfere with freedom of speech and of assembly guaranteed to all persons against state action by the due process clause of the Fourteenth Amendment.

West Virginia State Board of Education v. Barnette, 319 U. S. 624;
Thomas v. *Collins*, 323 U. S. 516;
Winters v. *New York*, 333 U. S. 507.

2. The statute and the regulations issued thereunder create an unreasonable presumption which denies due process of law as guaranteed by the Fourteenth Amendment.
Bailey v. *Alabama*, 219 U. S. 219;
McFarland v. *American Sugar Co.*, 241 U. S. 79;
Manley v. *Georgia*, 279 U. S. 1;
Tot v. *United States*, 319 U. S. 463;
Pollock v. *Williams*, 322 U. S. 4;
Mobile, Jackson & Kansas City RR. v. *Turnispeed*, 219 U. S. 35.

ARGUMENT

I. The Feinberg Law and the Regulations Issued Thereunder Constitute An Abridgement of Freedom of Speech and of Assembly

Education Law §3022 and the regulations issued by the Board of Regents (pp. 95-107) necessarily restrict the liberties of all persons in the teaching service. The regulations (pp. 102, 103) in effect command all such persons to sever relations with all organizations listed by the Regents within ten days on pain of loss of position. And this, regardless of the correctness of the list, of the pendency of judicial proceedings to review a particular listing. And it is no answer to say that if the Regents should be overruled in some instances persons who were members

of such organizations would not be penalized. The risk they run is too great to condone the interference with freedom of association.

Aside from this particular incidence of the regulations, there can be no doubt of the restrictive effect of the entire scheme on our cherished liberties. Such attempts at restriction are, of course, not new in our national life. After the First World War fear of the then recent Soviet Revolution led to the enactment of similar legislation, known as the Lusk Laws (Laws of 1921, Ch. 666). So eminent a patriot as Alfred E. Smith had vetoed this legislation when first passed in 1920. And he led the fight for repeal a few years later. He said as he signed the repealer:

> "The Lusk Laws * * * are repugnant to the fundamentals of American Democracy * * *. Teachers, in order to exercise their honorable calling, were in effect compelled to hold opinions as to governmental matters deemed by the state officer consistent with loyalty * * *. Freedom of opinion and freedom of speech were by these laws unduly shackled and an unjust discrimination was made against the members of a great profession. In signing these bills I firmly believe I am vindicating the principle that within the limits of the penal law every citizen may speak and teach what he believes" (School and Society, XVII [June 9, 1923], 635).

Similar consequences flow from the impact of the program devised by the new legislation on teachers generally as well as on particular individuals who might be brought up on charges. For laws such as these create fear and timidity wholly incompatible with the intellectual atmosphere in which teachers should live. They will become afraid to join movements or express views which might be challenged lest they be caught in the dragnet of the Regents' lists.

We submit that there can be little doubt that restrictions such as those imposed by this legislation violate constitutional provisions contained both in the federal and in the state Constitutions. Applicable here, of course, is the due process clause of the Fourteenth Amendment which, by repeated decisions of this Court, has been held to make binding on the states the prohibition contained in the First Amendment that no law shall be made "abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances". The most recent expression on this subject is in *Terminiello* v. *Chicago*, 337 U. S. 1.

It is also settled by repeated decisions of this Court that governmental authority may not seek to impose conformity of belief or expression on the people. As Mr. Justice Jackson said in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 at 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

Particularly important is it that there should be freedom of discussion on political subjects. See *Stromberg* v. *California*, 283 U. S. 359 at 369. See also *Thomas* v. *Collins*, 323 U. S. 516, 545.

The law is in part void on the score of vagueness (see *Winters* v. *New York*, 333 U. S. 507), for subdivision 1 of Section 3 invokes Education Law §3021 which uses the term "treasonable" and "seditious". It is hard to find words of more varied connotation. Surely the legislature

did not use "treasonable" in the limited sense in which it is defined in the United States Constitution, but no other use of the word has any definite meaning whatever. And "seditious", like "subversive" is an epithet directed at any advocacy of far-reaching change.

Subdivision 2 of Section 3 of the Feinberg Law implements Civil Service Law §12a in a manner which raises grave constitutional issues. We are discussing separately the problem raised by the presumption created by the new law. Here we need call attention only to the fact that the earlier law had no general impact on the teaching profession and created no atmosphere of intimidation and interference with the exercise of fundamental rights as is bound to result from the listing machinery set up by the new law.

We cannot, of course, let pass the suggestion of the court below that constitutional rights of free speech may be abridged as a condition of public employment. In support of that statement Judge Lewis cites, among other authorities, the old dictum of Justice Holmes while on the Supreme Judicial Court of Massachusetts (155 Mass. 216 at 220) and the recent decision of this Court in *United Public Workers* v. *Mitchell* (330 U. S. 75). Neither case is here pertinent, since neither dealt with expression of opinion or the right of association. Both dealt with partisan political activities alone.

Moreover, in *United States* v. *Thayer*, 209 U. S. 39, Mr. Justice Holmes indicated that his earlier statement was not to be taken literally. For he pointed out (209 U. S. at 42) that even office holders might have constitutional rights the legislature could not restrict. And in the *Mitchell* case the majority opinion recognized that government employees could not be deprived of all freedom (330 U. S. at 100).

The doctrine that unconstitutional limitations may be

imposed on a privilege has long since been abandoned, *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583.

The question, therefore, in each case is whether the restriction imposed on government employees is reasonably calculated to improve government service or whether it is an improper interference with fundamental rights.

We submit that in the case at bar the Court should weigh all the relevant considerations, bearing in mind that no presumption attaches to statutes in the field of freedom of expression. The issue is not whether Communists should be allowed to teach in the public schools, nor even whether persons who advocate the overthrow of the government by force should be allowed so to teach—the old law adequately takes care of such persons. The issue is whether lists should be promulgated of organizations which an administrative agency, without particular competence in that field, has declared advocate the overthrow of the government by force. The intimidatory impact of such listings has a double aspect. It not only directly affects the organizations listed but it causes persons in the school system to avoid contact with any groups whose ideas might conceivably lead to such listing. Such an interference with freedom of expression and association should be stricken down by this Court.

II. The Presumption Created By the Feinberg Law Is Unreasonable and Denies Due Process of Law

It is well settled that a legislature may not substitute a presumption for proof where there is no reasonable relation between the fact to be proved and the fact presumed: *Bailey* v. *Alabama*, 219 U. S. 219; *McFarland* v. *American Sugar Co.*, 241 U. S. 79; *Manley* v. *Georgia*, 279 U. S. 1; *Tot* v. *United States*, 319 U. S. 463; *Pollock* v. *Williams*, 322 U. S. 4. The rule applies to civil as well as

criminal matters: *Mobile, Jackson & Kansas City RR.* v. *Turnipseed*, 219 U. S. 35.

Section 2 of the Feinberg Law (Education Law §3022, subd. 2) declares that the disqualification specified by Civil Service Law §12a, subd. c. shall be presumed by proof of membership in an organization placed by the Regents on a "subversive" list.

For such a presumption there is no rational basis whatever. Under it a person is presumed disqualified for service in the educational system if he was at one time a member of an organization which the Regents may thereafter declare to be subversive, for the law makes no distinction between past and present membership. There is here no relation at all between the known fact—that is, membership, and the presumed fact—that is, disqualification for office. This is even worse than presumptions which have been struck down—as that of fraud from insolvency in the *Manley* case or of interstate transportation from possession in the *Tot* case.

The presumption here created is wholly unlike those upheld in *People* v. *Pieri*, 269 N. Y. 315, cited by the Appellate Division in the Second Department (p. 242), and in *People* v. *Farina*, 290 N. Y. 272, cited by the Third Department (276 App. Div. at 509). In those cases the person charged had special opportunity to know the facts and the prosecution lacked such knowledge (see *Casey* v. *United States*, 276 U. S. 413 at 418). Morever, there was a rational connection between the known fact (i. e., possession of contraband) and the presumed fact (i. e., illegal intent).

Here we have none of those elements. Surely the individual teacher has no special knowledge of the character of an organization of which he is said to be a member which justifies putting the burden of going forward with the evidence on him, nor, as we have pointed out, is there any rational relation between the known fact of membership and the presumed fact of disqualification.

Moreover, in all of the cases where presumption statutes have been upheld the facts which gave rise to the presumption were the subject of proof in the criminal proceeding. Here, however, the facts which give rise to the determination that the particular organization is subversive are not to be established at the teacher's hearing. The teacher is thus denied any opportunity of challenging the correctness of those facts.

The arbitrary character of this presumption becomes clear when we consider the predicament of an accused teacher. He has no way of knowing what considerations led the Regents to place on their "subversive" list the particular organization he is accused of having joined—and, under the regulations (pp. 102, 103) he must, at his peril, disaffiliate himself "in good faith" (whatever that means) within ten days after the promulgation of the list! Even if the Regents hold a hearing such hearing is not only ex parte as to the teacher, as pointed out by Judge Hearn (p. 179), but presumably secret.

How can a teacher come forward with evidence to establish that the Regents were wrong? To impose such a burden on him violates all principles of fair play and is a denial of due process.

Morever, if the accused teacher claims that he is not a member of the organization he is in a double dilemma. He may not want to risk all by resting only on a denial of membership. Yet he may be in no position to ascertain the facts with regard to the character of the organization with which he has been incorrectly linked. On the other hand, familiarity with the character of the organization may be held against his denial of membership. Even where the teacher may admit membership he may still be unable to obtain evidence which might clear the organization. The application of the presumption besets the accused teacher's path with such uncertainty and complication that it must be stricken down.

The court below evidently attempted to save the presumption by interpreting the statute to require proof that the teacher have knowledge of the "subversive" character of the organization. But even so, the presumption remains an unreasonable one. For what will actually happen under such an interpretation? Once an organization has been branded as "subversive" it will no doubt be argued that all persons who were members must have known its character and objectives. Morever, as the Appellate Division pointed out (p. 240), the listing itself constitutes knowledge of the character of the organization. Thus the case against the teacher is created by the process of judicial lifting of bootstraps. The attempt to justify the presumption by this gloss on the statute is wholly illusory.

The only proper conclusion is that the presumption created by the statute is void. That being so, plaintiffs were entitled to an injunction to prevent all attempts at enforcement of the law.

Cases Believed to Sustain Jurisdiction

Thomas v. *Collins*, 325 U. S. 516
Said v. *New York*, 334 U. S. 558

Statement Respecting Opinions

The opinion of the Court of Appeals, a copy of which is hereto annexed, was written by Judge Lewis. The opinion has not yet been reported.

For all the foregoing reasons this appeal should be allowed.

Respectfully submitted,

ARTHUR GARFIELD HAYS,
Attorney for Appellants.

OSMOND K. FRAENKEL,
Of Counsel.

APPENDIX "A"

Opinion of Hearn, J.

(Vol. 122, New York Law Journal, Page 1653, December 15, 1949)

Hearn, *J.*:

This is an action for a permanent injunction and a judgment declaring unconstitutional chapter 360, Laws of 1949 (commonly known as the Feinberg Law) section 12-a of the Civil Service Law (as implemented by the Feinberg Law) and the Regents' Rules and Commissioner's memorandum promulgated thereunder.

There are three motions before the court—one for a temporary injunction, another for leave to intervene as parties plaintiff and the third, by plaintiffs, for judgment on the pleadings. Since a decision on the third will dispose of all issues the court will consider it first.

The plaintiffs are a heterogeneous group. Among them are the Teachers Union, other unions, parents, parent-teacher associations, citizens, a social worker, the head of a religious group, teachers and taxpayers. The answer denies that any of them have the right to maintain this action.

There are only two groups of plaintiffs whose claim of a right to sue has substance—the teachers and the taxpayers.

As to the teachers, defendant says there is no justiciable controversy. No list has yet been promulgated by the Board of Regents—hence no teacher has been or can be accused of being a member of a listed subversive organization—in short, no one has been hurt. Plaintiff teachers, however, maintain that they are hurt by the very existence of the law on the books—that they are presently restrained in the exercise of their rights of free speech, free thought and freedom of association because they fear the sanctions contained in the statute—and that "uncertainty, peril and insecurity result from imminent and immediate threats to asserted rights." They say they should be allowed to sue now; that they should not have to wait until a list has been promulgated and then show that by membership in a listed subversive organization they are aggrieved.

Were this an open question the court would be inclined to agree with plaintiffs. If they must violate the law to gain the right to challenge it they risk inevitable discharge from their positions. "To require these employees first to suffer the hardship of a discharge is not only to make them incur a penalty; it makes inadaquate, if not wholly illusory, any legal remedy which they may have. Men who must sacrific their means of livelihood in order to test their rights to their jobs must either pursue prolonged and expensive litigation as unemployed persons or pull up their roots, change their life careers and seek employment in other fields. At least to the average person in the lower income groups the burden of taking that course is irreparable injury" (United Public Workers v. Mitchell, 330 U. S. 75, dissent by Douglas, J.).

Cogent as this argument may be, the court nevertheless is bound by the ruling of the majority in the above-cited case—and that ruling was that there is no justiciable controversy in a case such as this until the law has first been violated. Accordingly plaintiff teachers have no right to now maintain this action.

The right of the taxpayer plaintiffs presents a different proposition. Section 51 of the General Municipal Law permits a taxpayer to sue to prevent "any illegal act * * * or waste or injury to * * * property, funds or estate of * * * a municipal corporation." Defendant comes within the scope of this section "in so far at least as to authorize an action by a taxpayer to prevent waste of the City's money" (Lewis v. Board of Education, 258 N. Y. 117).

The complaint, among other things, alleges that defendant intends and threatens "to allocate and expend public funds" to effectuate the Feinberg Law; that defendant's imminent acts will cause further substantial waste of public funds; and that enforcement of the law "will involve substantial cost in time, supplies and material." The answer denies these allegations but admits that defendant intends and threatens and has taken steps immediately to effectuate the law.

The court need not ignore common sense and everyday

experience in appraising the pleaded facts. It is self-evident —and defendant, in fact, does not dispute it—that under the law an elaborate system of investigation will be set up (see New York City Superintendent of Schools' proposed order for enforcement of the Feinberg Law, New York Times, September 13, 1949). Moreover, should charges be preferred against any teachers extensive hearings necessarily will be held (see Regents' Rules on Subversive Activities, p. 12). The investigations and hearings will, of course, involve a liberal use of personnel time and consumption of material and supplies bought with public funds. It is worth noting in this connection that the Lusk Law (chap. 666 of the Laws of 1921), which was similar in many respects, carried with it an appropriation for the enforcement expenses of the State Department of Education. It is fair to assume that the enforcement of the law here under consideration likewise will require the expenditure of public funds.

In view of the foregoing the court holds that plaintiff taxpayers have the right to sue. In any event it being vitally important to the public at large and the school system in particular that the real issue herein be speedily determined the court should not "pause to consider whether the question is presented in appropriate proceedings" (Matter of Kuhn v. Curran, 294 N. Y. 207).

Since there are no issues of fact raised by the pleadings the motion for judgment will be considered on the substantive legal issue involved.

The problem posed by these statutes has many facets. Yet essentially they raise but one basic question—How far may the state go in imposing restrictions or conditions on employment as teachers in the public schools?

In seeking to answer this question it should be borne in mind that to impart the principles of democracy, freedom of thought and speech must be preserved in the school setting. The atmosphere must be one which encourages able independent men to enter the teaching profession. To develop good citizens teachers must give students the facts, help them to learn to think and urge them to reach their own conclusions. To so teach, the teacher must himself be

free to think and speak. He must not be under threat of enforced conformity to rigid standards; he must be free of blind censorship; he must be open-minded to new ideas—even when they do not appear to be orthodox. The heart of American education is independent thought. This was best stated in the charge of Judge Medina in the recent trial of United States v. Foster et al.; "I charge you that if the defendants did no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas, you must acquit them. For example, it is not unlawful to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence by the prosecution such as the Communist Manifesto, Foundations of Leninism, and so on. Of course these books are to be found in public libraries and in the libraries of American universities. Indeed, many of our most outstanding and sincere educators have expressed the view that these theories should be widely studied and thoughtfully considered, so that all may thoroughly appreciate their significance and the inevitable effects of putting such theories into practice."

We must also recognize that both state and teacher have dual characters. The state is both employer and government—the teacher both employee and citizen. Hence, the state, like any employer, may impose a condition on employment that bear a reasonable relationship to the duties to be performed (Constitution of State of New York, Art. V, sec. 6). Such condition may be valid even though it impinges upon the basic constitutional right of free speech if it is essential to the integrity of the public service and if the infringement is limited to the necessities of the situation.

But unlike a private employer the state is restricted to a considerable extent both as to the nature of the condition imposed and the manner of its imposition. Thus it may not bar one from public employment because of race, religion or political affiliation (United Public Workers v. Mitchell, 330 U. S. 75, 100). Nor may it bar one from public employment, even though the reason be sound, if the method employed constitutes conviction and punishment

without a judicial trial (United States v. Lovett, 328 U. S. 303). No more may the state bar teachers from the schools, for even a highly desirable and necessary reason if the method employed violates "due process."

It is particularly needful that we reaffirm and re-emphasize this doctrine at this stage in our history. In this connection it would be well to ponder a passage from The Times of London, written more than a hundred years ago. It appears in "Ordeal by Planning," by John Jewkes: "The greatest tyranny has the smallest beginnings. From precedents overlooked, from remonstrances despised, from grievances treated with ridicule, from powerless men oppressed with impunity, and overbearing men tolerated with complacence, springs the tyrannical usage which generations of wise and good men may hereafter perceive and lament in vain. At present, common minds no more see a crushing tyranny in a trivial unfairness or a ludicrous indignity, than the eye uninformed by reason can discern the oak in the acorn, or the utter desolation of winter in the first autumnal fall. Hence the necessity of denouncing with unwearied and even troublesome perseverance a single act of oppression. Let it alone and it stands on record. The country has allowed it and when it is at last provoked to a late indignation it finds itself gagged with the record of its own ill compulsion."

The court well knows that at the present time there are those who would launch a widespread attack on our institutions through the outward appearance of democratic process. They proceed by stealth and in disguise to destroy that which they appear to defend. But "historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (Holmes, J., in Northern Securities Co. v. United States, 193 U. S. 197, 400)," nor should they "change their form and content in response to the 'hydraulic pressure' (Holmes, J., supra) exerted by great causes."

There is yet another principle by which the court must be guided. A law which intrudes upon freedom of speech, thought, or association comes into court bare of the usual

presumption of validity because of "the preferred place given in our scheme" to these freedoms. And it is the character of the right, not of the limitation, which establishes what standard "shall be used in determining where the individual's freedom ends and the State's power begins" (Thomas v. Collins, 323 U. S., 516).

With these principles clearly in mind—cognizant always that every legal picture must have a moral frame—remembering that "the life of the law is not logic, but experience" (Oliver Wendell Holmes), let us examine the laws and rules here attacked.

It should be noted at the outset that the Feinberg Law is a new administrative statute implementing two older laws (Education Law 3021 and Civil Service Law 12-a). Its provisions merely establish procedures to facilitate enforcement of these two earlier statutes, they being substantive in nature.

Since its provisions refer to hearings and presumptions it may be well here to point out the rules relevant thereto.

Due process ordinarily requires "a fair and open hearing" with "not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them" (Morgan v. U. S., 304 U. S., 1, 19).

Presumptions may be created by statute only if there is "some rational connection between the fact proved and the ultimate fact presumed, and the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate" (McFarland v. Am. Sugar Co., 241 U. S., 86).

What are these statutes and rules? What do they seek to accomplish? How do they operate?

The Feinberg Law provides, inter alia, that the Board of Regents shall promulgate a list of "subversive" organizations after inquiry and "such notice and hearing as may be appropriate." The character and conduct of the hearing thus may be left to the unfettered discretion of the Regents. Under such provision it well may happen that an allegedly subversive organization, after appro-

priate notice to appear at a hearing, defaults and subsequently is listed by the Regents following an uncontested hearing. If it be assumed, as of course we may, that the Regents will properly enforce the law, such enforcement necessarily would be as follows: Adequate notice of a hearing is given to an organization; a full and proper hearing is had; but no member of the organization was in fact represented at the hearing, such member not having been a party to the proceeding. After the hearing let us further assume that the organization is placed on the list of subversive organizations.

Should the organization or a member wish to challenge this listing it would seem that this could be done in a proceeding pursuant to article 78 of the Civil Practice Act. But in a comparable situation the courts have held that they will not review such administrative action because no justiciable controversy exists (Joint Anti-Fascist Refugee Committee v. Clark, 177 Fed., 2d, 79; Internat. Workers Order v. Clark, District Court for District of Columbia, McGuire, J., April 12, 1949; Nat. Council for Soviet Am. Friendship v. Clark, C. C. A., D. C., not yet reported). A teacher is then charged with membership in the listed organization. At such hearing the organization is deemed to be subversive within the definition of Civil Service Law 12-a even though the finding was by an administrative body and, as to the accused teacher, the supporting evidence was hearsay and he had no opportunity to meet it. In short—the listing, as to him, was ex parte.

Is there any reasonable connection under these circumstances between the fact supposedly "proved" and the fact presumed? Is it consonant with American traditions of fairness to base on so flimsy a foundation a presumption which establishes the major portion of the case against an accused and casts upon him the burden of disproving substantially what it took the government eleven months to establish in the recent trial in the United States District Court (Southern District) between Judge Medina in the case of United States v. Foster et al.?

But this presumption as to the character of the organiza-

tion is not the only burden placed upon an accused teacher. The statute is ambiguous as to whether past as well as present membership is proscribed. Though the Regents' Rules interpret it as forbidding only present membership they create a presumption of continuance of past membership "in the absence of a showing that such membership has been terminated *in good faith.*" This rule well may be invalid under a constitutional ban on ex post facto legislation (see Calder v. Bull, 3 Dall., 386). Aside from this, however, it clearly places upon an accused teacher the oppressive burden of showing his innocence through affirmative proof of something as nebulous and intangible as "good faith"—and this in the face of the inevitable and justifiable skepticism which any realistic hearing officer must have as to the "good faith" of one accused of membership in a subversive organization.

There are yet other inequities in the procedure. A teacher found guilty by the Board of Education has a right of appeal. Education Law 310 gives the right to appeal to the State Commissioner of Education. Education Law, section 2523, gives an alternative right of appeal to the courts in an article 78 proceeding. Civil Service Law 12-a (d) provides for appeal to the courts where disqualification is pursuant to section 12-a. These three sections apparently overlap, and, to some extent, conflict with each other. In the present state of the law there is, to say the least, serious doubt as to whether any one of them exclusively controls and, if so, which—or whether they provide alternate remedies (see Matter of Nestler v. Board of Examiners, 192 Misc., 663). If the appeal is taken to the Commissioner of Education (under Education Law 310), that section provides that his determination is *final* and cannot be reviewed by the courts. In such case it is possible that the Regents' listing of an organization and the teacher's disqualification thereunder would constitute conviction and punishment without a judicial trial. If the appeal be taken to the courts in an article 78 proceeding (under Education Law 2523) the court's review might well be "inadequate if not illusory" (Kirn v. Noyes, 262 App. Div., 581), since it is but a limited review on the record

alone and the determination could be disturbed only if it had no warrant in the record, no reasonable basis in law and was arbitarary or capricious. It has been the unfortunate tendency of our courts in recent years largely to abdicate their true functions and powers in proceedings to review the determination of administrative bodies, so that today "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (Matter of Park East Land Corp'n v. Finkelstein, 299 N. Y., 70, 75). Here too, then, for all practical purposes, the procedure might be tantamount to conviction and punishment without judicial trial.

The teacher seeking to appeal finds himself confronted with still another question: Can he appeal to the courts under Civil Service Law, section 12-a(d). where the disqualification was under the procedure established by the Feinberg Law? The Feinberg Law itself neither contains machinery for appeals nor refers to any other statute in that regard. However, it is part of the Education Law, as are sections 310 and 2523, previously referred to, and these three sections deal exclusively with teachers and administrative personnel of the Department of Education. Civil Service Law 12-a, on the other hand, is a general statute applicable to all civil service employees of the state and city. It seems likely that the appeal statutes dealing specifically with teachers (Education Law 310 and 2523) would control the general statute dealing with all civil service employees (Civil Service Law 12-a) and consequently would bar the right of a teacher to come into court under section 12-a(d).

In short, a teacher discharged under the Feinberg Law would find himself on the horns of a dilemma. If he appeals to the commissioner of education he loses his recourse to the courts; if he starts an article 78 proceeding the court's review (on the record alone) is "inadequate if not illusory"; if he goes into court under Civil Service Law 12-a(d) he probably will be confronted with a court ruling that his proper remedy was under Education Law 310 or 2523—and this at time when, in all likelihood, the statute of limitations already has run on these other remedies.

Finally, an analysis of the Feinberg Law and of Civil Service Law 12-a(c), as implemented, discloses that they unmistakably embody the doctrine of guilt by association, which doctrine has been condemned by the United States Supreme Court (Schneiderman v. United States, 320 U. S. 118, 136).

As previously indicated the Feinberg Law is an administrative statute that provides machinery for the enforcement of Civil Service Law 12-a, the latter being substantive in nature. Section 12-a defines the offense—the Feinberg Law provides how its commission may be established.

The following are the offenses defined in section 12-a:

Subdivisions (a) and (b) disqualify teachers who personally advocate violent overthrow of the government by every conceivable form of utterance, oral or written. In short, they cover all forms of *personal* guilt. Consequently, subdivision (c), which disqualifies one who "becomes a member of any society" that advocates the proscribed doctrines, obviously adds another form of guilt—guilt through mere membership in a subversive organization even in the absence of personal guilt. Though personal nonguilt would thus be a defense to a charge made under subdivision (a) or (b), it would be no defense where the charge is mere membership under subdivision (c).

What does the Feinberg Law provide as to how a charge of membership in a subversive organization [under section 12-a(c)] shall be proved? It first directs the Board of Regents to promulgate a list of organizations which advocate the doctrines prohibited by section 12-a. It then provides that membership in "any such organization included in such listing" shall constitute prima facie evidence of disqualification. Disqualification for what offense? Obviously for membership in an organization that advocates violent overthrow of the government. But this offense [defined in section 12-a(c)] has only two elements—membership in an organization and advocacy by the organization of violent overthrow of the government. The first element, membership, must be established by direct proof. The second, advocacy by the organization of the proscribed doctrine, is established prima facie by the fact that the organi-

zation has been listed by the Board of Regents—the intention of the Legislature, of course, being to obviate the need for a protracted trial each time a teacher is accused of membership under section 12-a(c). The two together make out a complete case against the teacher. Should the teacher defend, what defenses may he interpose? Only the same two that he could formerly interpose to a charge under section 12-a(c) alone—either his non-membership or the organization's non-advocacy of proscribed doctrines. For the offense with which he is charged, under Feinberg Law procedures, is still a violation of section 12-a(c)—membership in an organization that advocates violent overthrow of the government. Here, again, then personal non-guilt is no defense since the charge is still mere membership even though the administrative procedure employed is that set out in the Feinberg Law. What this constitutes, of course, is the finding of guilt from mere association without proof of personal guilt.

That this may not be done under our law is clear.

In the court's charge to the jury in the case of United States v. Foster et al., which involved a prosecution under a comparable statute, Judge Medina said: "Under our system of law, guilt is purely personal and you may not find any of the defendants guilty merely by reason of the fact that he is a member of the Communist Party, no matter what you find were the principles and doctrines which were taught or advocated by that party." This has been the most recent reiteration of the established principle that: "Under our traditions beliefs are personal and not a matter of mere association, and men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles" (Schneiderman v. United States, 320 U. S., 118, 136; see also "Loyalty Tests and Guilt by Association," 61 Harv. L. Rev. 592, John Lord O'Brien).

The cumulative effect of the procedure as outlined then is this: At an "appropriate" hearing by the Board of Regents (an administrative body) an organization is found to advocate violent overthrow of the government; a member, as such, of the organization may not be present at this hear-

ing; neither the organization nor a member can review this determination in the courts. A teacher thereafter is charged with membership. At his hearing he is confronted with two onerous presumptions which he must affirmatively meet—presumptions which make out an entire prima facie case against him. They are (1) a presumption of the organization's guilt, based on an administrative board's non-reviewable hearing and finding which was ex parte and hearsay as to the teacher on trial; and (2) a presumption of continuance of past membership rebuttable only by showing its termination "in good faith." Then should he be found guilty and discharged, his rights on appeal are ambiguous and essentially inadequate. And the capstone of this jerry-built structure is the finding of guilty from mere membership, without any proof of personal guilt—the teacher's personal non-guilt in fact being irrelevant where the only charge is membership.

It does not appear to this court that these procedures add up to "those fundamental requirements of fairness which are of the essence of due process" (Morgan v. United States, 304 U. S., 1, 19).

Consequently subdivision (c) of Civil Service Law 12-a (as implemented by the Feinberg Law), section 2 of Education Law 3022 (Feinberg Law) and the Regents' Rules promulgated thereunder are unconstitutional under the due process clause of the Fourteenth Amendment.

In so holding it may observed that the foregoing determination in no way impairs the power of the Board of Regents, under the other adequate provisions of existing law, to promulgate and enforce reasonable rules and regulations designed to rid the school system of teachers found to be unfit.

In view of this determination, the motion to intervene is denied and the motion for a temporary injunction is not passed upon.

Judgment upon the pleadings is granted to plaintiffs to the extent indicated. Submit orders and judgment accordingly.

APPENDIX "B"

Opinion of Appellate Division

Supreme Court, Appellate Division—Second Judicial Department

Nolan, *P. J.*, Carswell, Sneed, Wenzel and MacCrate, *JJ.*

Abraham Lederman, as President of Teachers Union of The City of New York, Local 555 of the United Public Workers and others, Plaintiffs,

and

Irving Adler, George Friedlander, Mark Friedlander, Marta Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger, Plaintiffs-Respondents,

against

The Board of Education of the City of New York, Appellant

Appeal from so much of a judgment of the Supreme Court reported in , entered December 21, 1949, in Kings County, in accordance with an order of the court at Special Term, which granted a motion as to certain plaintiffs, under Rule 112, Rules of Civil Practice, for judgment on the pleadings, declaring section 12-a, subdivision (c), Civil Service Law, as implemented by Laws of 1949, Chapter 360, and section 3022, subdivision 2, Education Law, and chapter XV-B, section 254, of the Rules of the Board of Regents, to be unconstitutional, and granted other relief.

John P. McGrath, Corporation Counsel (Seymour B. Quel, Michael A. Castaldi and Morris Weissberg with him on the brief), for appellant.

Harold I. Cammer for respondents.

John P. Walsh and others for Kings County Committee of the American Legion, amicus curiae.

Paul O'Dwyer and others for New York City Chapter of the National Lawyers Guild, amicus curiae.

Arthur C. Buck and others for Association of Teachers of the Social Studies in the City of New York, amicus curiae.

R. Lawrence Siegel, and others for American Civil Liberties Union, amicus curiae.

CARSWELL, *J.*:

We are required to pass upon the constitutionality of two statutes. One is section 12-a, subdivision (c), of the Civil Service Law, and the other is section 3022 of the Education Law (L. 1949, ch. 360), the so-called "Feinberg Law." The former bans organizing a society or group advocating the overthrow of the State or National government by force, as well as membership therein. The latter implements Civil Service Law, section 12-a, in respect of its enforcement and, *inter alia*, provides for the removal of superintendents, teachers and employees in the educational system who continue as members of subversive organizations.

We may not pass upon the validity of administrative action thereunder or Regents' rules adopted pursuant thereto; such issues are not justiciable in this action.

The principles to which recourse must be had to resolve the contentions respecting the validity of the challenged statutes are elementary. The application of these principles does not present a novel or unique problem. These principles, and the reasoning vindicating them, have been the subject of prolix exposition in opinions without number. Consequently, after a thorough analysis of the arguments advanced and the cases invoked, both relevant and irrelevant, it will suffice merely to state our determinative conclusions on the pertinent or decisive contentions pressed upon us.

(1) The wisdom or unwisdom of the challenged statutes and the propriety of their enactment presents a legislative and not a judicial problem.

(2) The offenses defined in section 12-a, Civil Service Law, are crimes under section 161, Penal Law, and Title 18, United States Code, section 2385. These latter enactments have been held to be constitutional. (*Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Dunne*

v. *United States*, 138 F. 2d 137, certiorari denied 320 U. S. 790.) Hence, section 12-a, subdivision (c), Civil Service Law, is valid.

It is patently within the power of the Legislature, to promote the general welfare and protect the public service, to provide, as a reasonable condition governing public employment, that upon the commission of certain offenses described in section 12-a, Civil Service Law, public employment shall be discontinued. A constitutional right of free speech may be abridged as a condition to the enjoyment of public employment. One does not have a constitutional right to be a public employee except upon compliance with reasonable conditions imposed upon all, or imposed under reasonable classifications. (*United Public Workers* v. *Mitchell*, 330 U. S. 75; *McAuliffe* v. *New Bedford*, 155 Mass. 216; *People ex rel. Clifford* v. *Scannell*, 74 App. Div. 406, affd. on opinion below, 173 N. Y. 606; *Friedman* v. *Schwellenbach*, 159 F. 2d 22, certiorari denied 330 U. S. 838; *Washington* v. *Clark*, 84 Fed. Supp. 964; *Pawell* v. *Unemployment Compensation Bd. of Review*, 146 Pa. Superior Ct. 147; *Matter of Rabouine* v. *McNamara*, 275 App. Div. 1052; *People* v. *American Socialist Society*, 202 App. Div. 640.) The condition here imposed and the classification made are reasonable.

(3) A finding pursuant to the statute (§3022) as to an organization and its listing, upon sufficient proof and after a hearing on notice, bears rational relation to the facts to be presumed under section 3022, subdivision 2, Education Law, namely, that the organization does unlawfully advocate overthrow of the government and that a member-employee has knowledge thereof. The listing serves to apprise him of the character of the organization. The presumption in the statute is not conclusive, merely *prima facie*, and is a prescribed rule of evidence clearly within legislative competence. The presumed facts, moreover, are subject to defenses available to an employee at his own hearing.

He may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy. The dis-

qualification referred to in section 12-a, subdivision (c), in respect to membership by an employee in a described organization means with knowledge of the employee of its subversive character. And the burden on the whole case is to be borne by the one preferring the charges against him. (Civil Service Law, §12-a, subd. d.) The statute is prospective in operation and conforms with due process of law. (*Morgan* v. *United States*, 304 U. S. 1, 15; *Tot* v. *United States*, 319 U. S. 463, 467; *Casey* v. *United States*, 276 U. S. 413, 418; *Manley* v. *Georgia*, 279 U. S. 1, 6; *People* v. *Pieri*, 269 N.Y. 315, 324; *People ex rel. Beardsley* v. *Barber*, 266 App. Div. 371, affd. 293 N. Y. 706.)

(4) The contention that the statute (L. 1949, ch. 360; Education Law, § 3022) is a bill of attainder and, therefore, invalid, is without merit. It is predicated upon language in the preamble thereto and not contained in the statute. It is unsound and irrelevant to an inquiry as to the validity of the statute. It is long settled doctrine that such a preamble is not part of a statute. Recourse to a preamble is permissible only when ambiguity is to be resolved, or statutory language interpreted. (*Neumann* v. *City of New York*, 137 App. Div. 55, 59; *Westchester County S. P. C. A.* v. *Mengel*, 266 App. Div. 151, 155, affd. 292 N. Y. 121; *Pumpelly* v. *Village of Owego*, 45 How. Pr. 219; *Goodell* v. *Jackson*, 20 Johns. 693, 722.)

Irrespective of references in the preamble to the Communist Party and its affiliated organizations, section 3022, Education Law, provides for a finding, after a hearing on notice, as to all organizations. The provisions of the statute and not the references in the preamble are determinative.

The challenged statutes are constitutional.

(5) The validity of the rule of the Board of Regents need not be considered. No list has as yet been published, and any rule may be withdrawn and substituted prior to its practical application. Administrative procedure will be reviewed only at the instance of a person allegedly aggrieved thereby. *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 22; *Town of Pierrepont* v. *Loveless*, 72 N. Y. 211, 216.)

(6) The allegations in the complaint with respect to proposed expenditures by the defendant are expressly denied in the answer. This issue of fact precludes the granting of a judgment on the pleadings in favor of the plaintiffs.

The judgment, in so far as appealed from should be reversed on the law, with $10 costs and disbursements, the motion for judgment on the pleadings denied, with $10 costs, and the complaint dismissed, under Rule 112, Rules of Civil Practice, with costs.

APPENDIX "C"

THOMPSON

vs.

WALLIN

[301 N. Y. 476]

STATEMENT OF CASE

November, 1950

ROBERT THOMPSON, as Chairman of the Communist Party of the State of New York, et al., *Appellants*,

v.

WILLIAM J. WALLIN et al., Constituting the Board of Regents of the University of the State of New York, *Respondents*

In the Matter of CHARLES L'HOMMEDIEU et al., Appellants, against BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK et al., Respondents

ABRAHAM LEDERMAN, as President of Teachers Union of the City of New York, Local 555 of the United Public Workers, et al., Plaintiffs, and IRVING ADLER et al., Appellants, *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK, Respondent

Decided November 30, 1950.

APPEAL, in the first above-entitled action, from a judgment in favor of defendants, entered March 15, 1950, upon

an order of the Appellate Division of the Supreme Court in the third judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs, entered in Albany County upon an order of the court at Special Term (Shirick, J.; opinion 196 Misc. 686, granting a motion by plaintiffs for judgment on the pleadings declaring unconstitutional chapter 360 of the Laws of 1949 (2) declared said statute to be constitutional in all respects, and directed a dismissal of the complaint.

APPEAL, in the second above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 15, 1950, which reversed, on the law, an order of the Supreme Court at Special Term (Shirick, J.; opinion 196 Misc. 686), entered in Albany County, in a proceeding under article 78 of the Civil Practice Act granting a motion by petitioners for an order directing respondents, constituting the Board of Regents and others, from taking any action pursuant to chapter 360 of the Laws of 1949 and declaring said statute to be unconstitutional. The order of the Appellate Division directed a dismissal of the petition.

APPEAL, in the third above-entitled action, from a judgment in favor of defendant, entered April 5, 1950, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs-appellants, entered in Kings County upon an order of the court at Special Term (Hearn, J.; Opinion 196 Misc. 873) granting a motion by said plaintiffs for judgment on the pleadings under rule 112 of the Rules of Civil Practice (A) declaring unconstitutional subdivision (c) of section 12-a of the Civil Service Law as implemented by chapter 360 of the Laws of 1949, and subdivision 2 of section 3022 of the Education Law, and section 254 of chapter XV-B of the Rules of the Board of Regents, and (B) restrained respondent board from enforcing said statutes and rule. The Appellate Division denied plaintiffs' motion for judgment on the pleadings and dismissed the complaint.

Abraham Unger, Osmond K. Fraenkel, David M. Freedman and *Bernard Jaffe* for appellants in first above-entitled action.

Samuel M. Birnbaum and *Solomon Kreitman* for American Legion Department of New York, *amicus curiae*, in support of respondents' position in first above-entitled action.

Frederic A. Johnson, Osmond K. Fraenkel, Fred G. Moritt and *Morris Eisenstein* for Appellants in second above-entitled proceeding.

Nathaniel L. Goldstein, Atotrney-General (*Wendell P. Brown and Ruth Kessler Toch* of Counsel) for Respondents in second above-entitled proceeding.

Arthur Garfield Hays and *Osmond K. Fraenkel* for Appellants in third above-entitled action.

John P. McGrath, Corporation Counsel (*Michael A. Castaldi, Seymour B. Quel* and *Morris Weissberg* of counsel), for respondent in third above-entitled action.

LEWIS, J. An appeal in each of these three cases presents for our decision the constitutionality of section 3022 of the Education Law (L. 1949, ch. 360), commonly known, and hereinafter referred to, as the Feinberg Law.*

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* The following statement sets forth procedural steps taken prior to the present appeal to the Court of Appeals in each of the three cases under review:

Thompson et al. v. *Wallin et al.* (276 App. Div. 463) is an action by the chairman and secretary of the "Communist Party of the State of New York" in which judgment is sought declaring the Feinberg Law unconstitutional and enjoining the defendant, the Board of Regents of the State of New York, from enforcing its provisions. At Special Term judgment on the pleadings was granted to the plaintiffs (196 Misc. 686). At the Appellate Division, Third Department, the judgment entered at Special Term was reversed on the law, the complaint was dismissed and judgment on the pleadings was granted to defendants declaring the statute constitutional.

Matter of L'Hommedieu et al. v. *Board of Regents et al.* (276 App. Div. 494) is a proceeding under article 78 of the Civil Practice Act by persons now or formerly employed in the public school system of the City of New York who seek an order directing the defendants, Board of Regents and others, "to disregard Chapter 360 of the Laws of 1949 [Feinberg Law], and to cease and desist from taking any steps toward the enforcement of the provisions of said law * * * and to treat said enactment as a nullity * * *." At Special Term the statute was declared unconstitutional and the relief sought by the petitioners was granted (196 Misc. 686). At the Appellate Division, Third Department, the order of Special Term was reversed on the law and the petition dismissed.

Lederman v. Board of Education of City of New York (276 App.

At the outset the fact should be noted that prior to the enactment of the challenged statute, the Legislature had prescribed statutory standards governing within the State not only the conduct of teachers and other employees in the public school system but also those persons employed throughout the broad field of State civil service. Thus we find that by the Laws of 1917, chapter 416, there was added to the Education Law, section 3021 (formerly § 568) which provides:

"§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

Thereafter, the Legislature, by the Laws of 1939, chapter 547, added to the Civil Service Law, section 12-a which now provides:

"12-a. *Ineligibilty.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word

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Div. 527) is an action by Teachers Union, Local 555 of the United Public Workers, and others, in which judgment against the defendant Board of Education is sought declaring the Feinberg Law and section 12-a of the Civil Service Law and the rules and accompanying memorandum issued by the Commissioner of Education, be declared unconstitutional and enjoining the defendant board and its agents from taking any action based upon said statutes, rules or memorandum. At Special Term the statutes, rules and memorandum thus challenged were declared unconstitutional and the plaintiffs were granted judgment on the pleadings (196 Misc. 873). At The Appellate Division, Second Department, the judgment entered at Special Term, insofar as appealed from, was reversed on the law, the motion for judgment on the pleadings was denied, and the complaint was dismissed.

of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

"(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

"(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

It was ten years later—in 1949—that the Legislature found within the State conditions existing which so adversely affected the public schools as to prompt the enactment of the Feinberg Law. The following statement by the Legislature—which prefaces the three operative sections of the statute—is declaratory of conditions found by the Legislature which prompted the enactment:

"Section 1. The legislature hereby finds and declares that

there is common report that members of the subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to

meet this grave menace and to report thereon regularly to the state legislature."*

To meet conditions thus found to exist and as a preventive measure against the dissemination of subversive propaganda among children in the public schools the Legislature enacted the Feinberg Law which is now the subject of attack by the appellants as violating provisions of both the Federal and State Constitutions. The law thus challenged, which the Laws of 1949, chapter 360, added to the Education Law as section 3022, provides as follows:

"§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may

* Reference to the Session Laws of 1949 will disclose that the prefatory declaration of the legislative purpose—section 1 of chapter 360 of the Laws of 1949—is not made a part of the Education Law.

utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purpose of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state. * * *"

In considering the criticism which the appellants level at the Feinberg Law we may not, of course, substitute our judgment for that of the Legislature as to the wisdom or expediency of the legislation. To do so would transcend limits of our field of inquiry. (*American Communications Assn.* v. *Douds*, 339 U. S. 382, 400-401; *People* v. *Nebbia*, 262 N. Y. 259, 271.) Within those limits we examine the challenged law to determine whether, as claimed by the appellants, either the Federal or State Constitution is violated by provisions in the statute that membership in any organization, which the Board of Regents—after inquiry, notice and hearing—shall find and list as advocating the overthrow of the government by violence or unlawful means, shall be *prima facie* evidence of disqualification for the appointment or retention in the service of the public school system.

In considering the several grounds of constitutional attack we are mindful that the Feinberg Law serves to implement section 12-a of the Civil Service Law (quoted *supra*)

—an implementation found by the Legislature to be expedient in view of certain existing circumstances which, as we have seen, the law-making body was careful to set forth in its declaration of legislative purpose. Such implementation, we note, prescribes a basis of *disqualification for employment* by State and municipal agencies of personnel essential to a constitutional function of the State—the education of its children. (N. Y. Const., art. XI, § 1.) We are also mindful that a public employee has no vested, proprietary right to his position which transcends the public interest or the general welfare of the community he serves. In other words public employment as a teacher is not an uninhibited privilege. True, there are limitations upon those grounds upon which public employment may be denied—for example an applicant's religion. It does not follow, however, that the statutory proscription against membership in an organization which subscribes to subversive tenets or advocates the overthrow of government by violence or unlawful means may not be a legal basis for denying an application for public employment as a teacher, or for terminating such employment for cause after inquiry, due notice and hearing.

Concerned, as we are, with the qualification for public employment in the vital field of education, we regard the law here challenged as an effort by the Legislature to insert a new strand in the mesh by which a screening process is accomplished in the selection of those who teach the State's children. Strands which serve a like purpose are found in section 3002 of the Education Law, which denies to any person the right to serve as a teacher in a public school until he or she shall have taken and subscribed an oath to support the Federal and State Constitutions; also in section 801 *id.*, which requires that in all public schools instruction shall be given in "patriotism and citizenship". As the Legislature has authority over the discipline and efficiency of public service, we think its judgment, as expressed in the restrictive provisions of the statute under review, bears a reasonable relation to the legislative purpose to safeguard the public school system. (See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100;

American Communications Assn. v. *Douds, supra,* p. 405; *New York ex rel. Bryant* v. *Zimmermann,* 278 U. S. 63, 72-73; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Hawker* v. *New York,* 170 U. S. 189, 192-197.) Those cases stand for the legal principle which prompted Judge Holmes—as he then was—to write in *McAuliffe* v. *Mayor of New Bedford* (155 Mass. 216, 220), the familiar statement: "The petitioner may have a constitutional right to talk politics, but he has no constitional right to be a policeman."

Passing to the appellants' claim that the disqualification for employment in the State's public school system, prescribed by section 12-a of the *Civil Service Law* as implemented by the Feinberg Law, is incompatible with freedoms guaranteed by the First Amendment to the Federal Constitution and those guaranteed by section 8 of article I of the State Constitution: We know that the freedoms which the appellants now invoke are not absolute and that they do not deprive the State of its primary right to self-preservation. We are also aware that those freedoms do not sanction unbridled license. (*People* v. *Gitlow,* 234 N. Y. 132, 137, affd. *sub nom. Gitlow* v. *New York,* 268 U. S. 652-666-667; *Schenck* v. *United States,* 249 U. S. 47, 52.) Indeed "* * * it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts." (*American Communications Assn.* v. *Douds, et al. supra,* p. 394.) When *People* v. *Gitlow* (*supra*), reached the Supreme Court of the United States the opinion there written contained the following statements which are apposite to this phase of our inquiry (pp. 666-668):

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents

the punishment of those who abuse this freedom. * * * Reasonably limited, it was said by Story * * * this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

"That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. * * * Thus it was held by this Court in the *Fox Case* [236 U. S. 273], that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert Case* [254 U. S. 325], that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

"And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and *threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press,* said Story (*supra*) *does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. * * * It does not protect publications prompting the overthrow of government by force;* the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. * * * And *a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. * * * In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied."* (Emphasis supplied.) (See, also, *Cox* v. *New Hampshire,* 312 U. S. 569, 674; *Gilbert* v. *Minnesota,* 254 U. S. 325, 332, 339; *Schenck* v. *United*

States, supra, p. 52; *Fox* v. *Washington,* 236 U. S. 273, 276-277; *Patterson* v. *Colorado,* 205 U. S. 454; 462; *United States ex rel. Turner* v. *Williams,* 194 U. S. 279, 294; *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *People* v. *Most,* 171 N. Y. 423, 431.)

In the three cases now before us it was obviously within the province of the Legislature to decide in the first instance whether conditions prevailed within the State which threatened the well-being of its public school system and called for some protective measure. By enacting the Feinberg Law the Legislature has found and has declared that conditions—referred to in the preamble to the statute in suit—did exist and were of such a character as to require the adoption of statutory measures which will protect public school children from subversive influences. "That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler* v. *Kansas,* 123 U. S. 623, 661; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest." (*Whitney* v. *California,* 274 U. S. 357, 371.) Paraphrasing what was written in *Gitlow* v. *New York* (268 U. S. 652, 669, *supra*), we cannot say, in view of circumstances set forth in the preamble to the statute, that the Legislature acted arbitrarily or unreasonably when, in the exercise of its judgment as to measures necessary to protect the public school system, it sought "to extinguish the spark without waiting until it has enkindled the flame * * *; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

Whether that danger was "clear and present"—within the rule of *Schenck* v. *United States* (*supra,* p. 52) as interpreted and applied in *American Communications Assn.* v. *Douds* (*supra,* pp. 393-400)—is answered by the Legislature's factual finding that an infiltration of members of subversive groups into employment in the public schools of the State has occurred and continues; that the consequence of such infiltration is that subversive propaganda can be disseminated among children of tender years

by those who teach them and to whom the children look for guidance, authority and leadership; and that members of such groups frequently use their office or position to advocate and teach subversive doctrines.

Giving the Legislature's declaration of findings and purpose the weight to which it is entitled, we cannot say, upon the records before us, that the Feinberg Law is an unreasonable or arbitrary exercise of the police power of the State; nor can we say that it unwarrantably infringes upon any constitutional right of free speech, assembly or association.

The appellants also contend that the Feinberg Law is a bill of attainder and that, as such, it violates section 9 of article I of the Federal Constitution. As a basis for that assertion the appellants note the facts, stated in the preamble of the statute (*supra*) as findings by the Legislature, that there is common report that members of subversive groups "and particularly of the communist party" have infiltrated into public employment in the public schools of the State; that members of such groups frequently use their position to advocate and teach subversive doctrines, and in consequence that subversive propaganda can be disseminated among children in attendance at the public schools.

A bill of attainder has been defined as "* * * a legislative act which inflicts punishment without a judicial trial." (*Cummings* v. *Missouri*, 4 Wall. [U. S.] 277, 323.) By basing their argument upon excerpts from the preamble of the Feinberg Law appellants rely upon what is clearly a prefatory statement by which the Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law. (*Pumpelly* v. *Village of Owego*, 45 How. Prac. 219, 257.) Furthermore, a textual examination of the provisions of the Feinberg Law — section 3022 — in the light of the above-quoted definition of a bill of attainder, discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subver-

sive. The text also makes provision for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry. It is also clear that no punishment is inflicted upon any organization which the Board of Regents—after hearing—shall find advocates the overthrow of government by force or unlawful means. (Cf. *American Communications Assn.* v. *Douds*, *supra*, pp. 413-414.) In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a proceeding under article 78 of the Civil Practice Act. We are thus led to conclude that the Feinberg Law has none of the legal characteristics of a bill of attainder.

There is also an assertion by the appellants that the statute is unconstitutionally vague. We find no lack of clarity in the operative clause to be found in subdivision 2 of section 3022, which directs the Board of Regents, after inquiry, notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law."

Under subdivision 2 of the statute no organization may be listed by the Board of Regents as subversive until "after inquiry, and after such notice and hearing as may be appropriate". The statute also makes it clear that, when it appears that one who seeks to establish or retain employment in the State public school system knowingly holds membership in any organization named upon any listing for which subdivision 2 of section 3022 makes provision, proof of such membership "shall constitute prima facie evidence of disqualification" for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence

to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification", as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process. Reading the statute in that way, as we do, we cannot say there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school system of the State.

We have seen that the Legislature and administrative agencies have authority over the discipline and efficiency of the public service. When in its judgment and discretion the Legislature finds acts by public employees which threaten the integrity and competency of a governmental service such as the public school system, legislation adequate to maintain the usefulness of the service affected is necessarily required to forestall such danger. Believing the Feinberg Law to be the Legislature's answer to such a need, we find in that statute no restriction which exceeds the Legislature's constitutional power.

The judgments and order should be affirmed, with costs.

Loughran, Ch. J., Conway, Desmond, Dye, Fuld and Froessel, JJ., concur.

Judgment accordingly.